

In Re: Aksh Optifibre Ltd.

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Court : Rajasthan

Decided On : Feb-23-2007

Reported in : [2007]77SCL219(Raj)

Judge : Shiv Kumar Sharma, J.

Appellant : In Re: Aksh Optifibre Ltd.

Disposition : Petition allowed

Judgement :

ORDER

Shiv Kumar Sharma, J.

1. The petitioner company Aksh Optifibre Limited, filed this petition under Sections 391 to 394 of the Companies Act, 1956 (hereinafter shall be referred to as 'the Act of 1956') for sanctioning the Scheme of Amalgamation between petitioner Company (Transferee Company and Aksh Broadband Limited (Transferor-company).

2. That the petitioner company was incorporated on 19-3-1986 under the name and style of Aksh India Private Limited with the Registrar of Companies, NCT of Delhi and Haryana and was converted into a Public Limited Company on 13-3-1994 vide Special Resolution passed on 8-3-1994. Thereafter with effect from 7-2-2000 the transferee company shifted its registered office from the NCT of Delhi to

the State of Rajasthan.

3. The position authorized issued, subscribed and paid up capital of the petitioner company as on date is detailed out in para No. 5 of the petition.

4. The main objects of the petitioner company as set out in the object clause of its Memorandum of Association, have been detailed out in para No. 4 of the petition. The copy of the latest, audited annual accounts of the petitioner company has been submitted as Annexure C to the petition.

5. The petitioner company in the meeting of the Board of Directors approved the scheme of amalgamation in the resolution marked as Annexure D with the petition.

6. The petitioner Company filed company application No. 51 of 2006 and this court vide its order dated 22-9-2006 allowed the application and issued direction for holding separate meetings of the equity shareholders, unsecured creditors and the secured creditors of the petitioner company for the purpose of considering the proposed scheme of amalgamation between Aksh Broadband Limited (Transferor Company) and Aksh Optifibre Limited (Transferee Company) at Bhiwadi and Gurgaon. At the meeting of the secured creditors held at Gurgaon, out of 3 secured creditors, 2 secured creditors representing Rs. 10 crores secured debt voted in favour of the resolution of scheme of amalgamation. In the meeting of the 46 equity shareholders, 43 equity shareholders representing rupees one crore eleven lakhs seventy two thousand ninety six voted in favour of the scheme of amalgamation. In the meeting of the 15 unsecured creditors representing Rs. 11,45,24,650 (rupees eleven crores forty five lakhs twenty four thousand six hundred and fifty only) voted in favour of the scheme of amalgamation. The petitioner company submitted in the petition that the transferor company will file the requisite petition before the Delhi High Court for sanctioning the scheme of amalgamation and prayer has been made for sanctioning the above scheme in relation to the petitioner company.

7. & 8. On filing the above petition, this court on 15-12-2006 issued notice to the Regional Director, and Registrar Companies. The notices were also directed to be published in two Newspapers, one in English in Finance Express (Delhi Edition)

and Hindi Newspaper Dainik Nav Jyoti (Jaipur Edition). The petitioner company filed Newspapers dated 15-1 -2007 of the notices published in the respective newspapers.

9. In response to the notice served, the Regional Director Northern, Region, Ministry of Company Affairs, Noida, filed affidavit and submitted that as per Clause 3(a) of Part III of the Scheme of Amalgamation all the employees of the Transferor company shall become the employees of the Transferee company without any break or interruption in their services upon sanctioning of the scheme of amalgamation by this Court. As per para 2(b) of Part V of the scheme, the share capital of a company can be increased only after following the procedures prescribed under the relevant provisions of the Companies Act and payment of requisite fees to the Registrar of Companies and stamp duty to the State Government. It was prayed for considering this aspect of the matter. It was further submitted that certain creditors have filed winding up petitions (Company Petition Nos. 60, 359 and 360 of 2005) against the Transferor company Aksh Broadband Ltd. before the Delhi High Court. Upon Scheme of Amalgamation becoming effective the transferor company shall vest with the transferee company and the transferor company shall stand liquidated without being wound up, and they shall not be able to challenge any of the legal proceedings of the transferor company on the grounds of the territorial jurisdiction only and the transferee company shall have all legal rights and remedies as are available in due course of law to defend such proceedings. The Bombay Stock Exchange vide its letter dated 13-9-2006 given approval subject to certain conditions and the transferee company may be directed to comply with the said conditions on approving the scheme.

10. The learned Counsel for the petitioner company filed photostat copies of the orders passed by the Delhi High Court disposing the company petition Nos. 359 and 360 of 2005 filed against the transferor company at Delhi High Court.

11. I have heard learned Counsel for the parties and weighed contents of the petition, and affidavit filed by the Regional Director.

12. In *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* [1997] 1 SCC 579 : [1996] 10SCL70 following broad contours of the jurisdiction of the Company Court have

been laid down for sanctioning the scheme:

(1) The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

(2) That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 Sub-section (2).

(3) That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

(4) That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 Sub-section (1).

(5) That all the requisite material contemplated by the proviso of Sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.

(6) That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not unconscionable, nor contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

(7) That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote, any interest adverse to that of the latter compromising the same class whom they purported to represent.

(8) The scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

(9) Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392. Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. The supervisor cannot ever be treated as the author or a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as *sui juris* with their open eye and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. (p. 579)

13. In *Hindustan Lever v. State of Maharashtra* [2004] 9 SCC 438 : [2003] 48 SCL 630 the Apex Court indicated that the jurisdiction of the Company Court while

sanctioning the scheme is supervisory only. While exercising its power in sanctioning the scheme of amalgamation the court is to satisfy itself that the provisions of statute have been complied with, that the class was fairly represented by those who attended the meeting, that the statutory majority was acting bona fide and not in an oppressive manner and that the arrangement is such as which a prudent, intelligent or honest man or a member of the class concerned and acting in respect of the interest might reasonably take. While examining as to whether the majority was acting bona fide the court would satisfy itself to the effect that the affairs of the company were not being conducted in a manner prejudicial to the interest of its members or to public intent. The basic principle underlying such a situation is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties, the same being that it should not be unfair, contrary to public policy and unconscionable or against the law once these things are satisfied the scheme has to be sanctioned as per the compromise arrived at between the parties. The court would have no further jurisdiction to sit in appeal over the commercial wisdom of the class of persons who with their eye open give their approval, even if, in the view of the court a better scheme could have been framed.

14. Bearing the above principles in mind I proceed to weigh the Scheme as well as the objection raised by the Regional Director in his affidavit regarding pendency of company petition for winding up of transferor company. Out of the three company petitions for winding up of the transferor company two petitions have already been disposed by the Delhi High Court as per the photostat copies of the orders produced by the learned Counsel for the petitioner company. As per the law laid down by the Apex Court that while exercising its power in sanctioning the scheme of amalgamation, the court is to satisfy itself that the provisions of statute have been complied with, that the class was fairly represented by those who attended the meeting, that the statutory majority was acting bona fide and not in an oppressive manner and that the arrangement is such as which a prudent, intelligent or honest man or a member of the class concerned and acting in respect of the interest might reasonably take. While examining as to whether the majority was acting bonafide, the court would satisfy itself to the effect that the affairs of the company were not being conducted in a manner prejudicial to the

interest of its members or to public intent. The basic principle underlying such a situation is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties, the same being that it should not be unfair, contrary to public policy and unconscionable or against the law-once these things are satisfied the scheme has to be sanctioned as per the compromise arrived at between the parties. In the instant matter in the separate meetings of the equity shareholders, unsecured creditors and secured creditors voted in favour of the scheme of amalgamation and this court does not have jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme.

15. Having closely scrutinised the Scheme of Amalgamation, I find that it is not unjust and unfair to the creditors or any class of creditors. The scheme appears to be reasonable, according to law and in the interest of the shareholders.

16. For these reasons the petition stands allowed and the Scheme of Amalgamation is sanctioned in terms of prayer Clauses (i) to (iii). Costs of Rs. 2,500 (two thousand five hundred only) to the Official Liquidator to be paid by the petitioner within two weeks from today.